

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK
NOV 18 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0120-PR
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JAMES GREG JOHNS,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GREENLEE COUNTY

Cause Nos. CR 2003-012, CR 2004-041, and CR 2007-053

Honorable R. Douglas Holt, Judge

REVIEW GRANTED; RELIEF DENIED

Derek D. Rapier, Greenlee County Attorney
By Michael W. McCarthy

Clifton
Attorneys for Respondent

Law Offices of Stephen Paul Barnard, PC
By Stephen Paul Barnard

Tucson
Attorneys for Petitioner

E S P I N O S A, Presiding Judge.

¶1 Pursuant to a plea agreement, petitioner James Johns pled guilty to aggravated driving under the influence of an intoxicant (DUI) in case number CR 2007-0053. He also

admitted having violated the terms of his probation in three other matters: Graham County case number CR 2005-0196, and Greenlee County case numbers CR 2004-041 and CR 2003-012. The trial court entered a judgment of guilt in CR 2007-053, revoked Johns's probation in the other matters and sentenced him to consecutive terms of imprisonment in all four cases totaling 10.75 years.¹ Johns filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., arguing the trial court had violated his due process rights by illegally imposing consecutive sentences in CR 2004-041 and CR 2003-012. Following a hearing, the trial court dismissed the petition. We review its decision for an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). Finding none, we deny relief.

¶2 As he did below, Johns contends that, in sentencing him based on the probation violations in CR 2004-041 and CR 2003-012, the trial court had been bound by the terms of a 2004 plea agreement that had resulted in his conviction in CR 2004-041 and had resolved a petition to revoke his probation in CR 2003-012. Pursuant to the 2004 agreement, the trial court had the option of placing and continuing Johns on probation or revoking probation and sentencing him to terms of imprisonment. The agreement specifically provided, however, that "all incarceration in these cases will run concurrently." The court suspended the imposition of sentence in CR 2004-041 and placed Johns on five years' intensive probation; it reinstated Johns's probation in CR 2003-012, ordering that Johns be placed on intensive

¹The Honorable R. Douglas Holt, Presiding Judge of Graham County, appears to have been sitting as a Greenlee County judge in the Greenlee County matters. We also note that, although Johns has included the Graham County number on the caption of his petition for review, he is only challenging the Greenlee County sentences.

probation supervision until August 1, 2007. Johns committed the offense underlying his conviction in CR 2007-053 and constituting his most recent probation violations in January 2007. He argues that the court's subsequent imposition of consecutive sentences following its revocation of his probation in CR 2003-012 and CR 2004-041 was illegal in light of the 2004 agreement and violated his right to due process of law.

¶3 The trial court dismissed Johns's petition for post-conviction relief, stating:

The Court heard Petitioner's counsel argue to the Court that the Court was precluded from [imposing] consecutive sentences regarding CR 2003-012 and CR 2004-041 because Mr. Johns was relying on the old plea agreement which required concurrent sentences in 2004. That new claim was never part of the plea negotiations in resolving the current matters and was not argued by [Johns's counsel] during change of plea or sentencing. It is clearly an afterthought, and was not part of the plea negotiations between [defense counsel] and the County Attorney Mr. Johns or his attorney should have told the Court during the change of plea or sentencing that Mr. Johns was relying on the old plea agreement from 2004.

The Court finds that Defendant has waived this due process claim Having never brought it before the Court, Defendant cannot now argue that the Court's sentence of consecutive terms was in fact illegal or lacking constitutional due process.

¶4 Johns concedes that his 2008 plea agreements resolving the petitions to revoke probation in CR 2003-012 and CR 2004-041 did not explicitly preclude the trial court from imposing consecutive sentences. Rather, the agreements provided the sentences in those cases must be consecutive to the sentence imposed in CR 2007-053, but they expressly "left to the discretion of the Court" whether the sentences in the earlier cases would be concurrent or consecutive to each other. He argues, however, that the court was legally constrained to

sentence him to concurrent sentences in light of the 2004 plea agreement and further argues that he sufficiently raised the issue prior to and at sentencing. We disagree.

¶5 Our supreme court has “recogniz[ed] that . . . the state is bound by plea agreements which induce a plea of guilty.” *State v. Fuentes*, 26 Ariz. App. 444, 447, 549 P.2d 224, 227 (1976), *opinion adopted by State v. Fuentes*, 113 Ariz. 285, 551 P.2d 554 (1976); *see also Santobello v. New York*, 404 U.S. 257, 262 (1971). And it has noted that “[t]his principle also finds recognition in the provisions of Rule 17.4[(e), Arizona] Rules of Criminal Procedure, which specifically requires that the defendant be given an opportunity to withdraw his plea if the trial judge rejects the plea agreement or any of its provisions.” *Fuentes*, 26 Ariz. App. at 447, 549 P.2d at 227. Upon the revocation of a defendant’s probation, however, a trial court may impose a sentence that exceeds a sentence to which the parties have stipulated in a plea agreement, unless the record shows the stipulated sentence “was to apply to any postrevocation sentencing.” *Id.*

¶6 We find no abuse of discretion in the trial court’s implicit determination here that the record does not show the provision in the 2004 plea agreement requiring concurrent sentences was to apply following probation revocation proceedings. Johns concedes that the 2004 agreement itself does not expressly so provide. And, as the state points out, it presented uncontroverted testimony at the hearing on Johns’s petition for post-conviction relief from the prosecutor who had been involved in the 2004 proceedings that this was not the understanding of the parties at the time. Johns contends that the prosecutor’s testimony was “self-interested,” but the trial court was entitled to determine the witness’s credibility. *See*

State v. Fritz, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988) (trial court sole arbiter of witness credibility in post-conviction proceeding).

¶7 He further contends that his case is distinguishable from *Fuentes* because the trial court did not specifically explain to him in the 2004 proceedings that, by violating his probation, he could subject himself to the possibility of consecutive prison sentences on the underlying offenses. In *Fuentes*, after finding “nothing [in the record] to indicate that the sentencing stipulation” there had been meant “to apply to any postrevocation sentencing,” the court stated: “This conclusion is further supported by the fact that at the time defendant was placed on probation, the trial court specifically advised the defendant that if he violated the terms of his probation he could be sentenced ‘in accordance with the law,’ that is, to a term of up to ten years” But the court did not condition its finding on this circumstance.

¶8 Moreover, we agree with the trial court that Johns waived any conceivable claim that the provision in the 2004 agreement was to apply to his sentencing following the revocation of his probation. As noted above, the 2008 plea agreement specifically afforded the trial court discretion to impose concurrent or consecutive sentences in the underlying cases. The trial court fully explained the terms of the 2008 agreement to Johns at the change-of-plea hearing, including that it had the option of sentencing him to consecutive terms of imprisonment on the underlying convictions. And although Johns’s counsel urged the court to impose concurrent sentences, asked the court to “consider” the sentencing provision in the 2004 agreement, and insisted that concurrent terms were a “viable option” under the 2008 agreement, he never argued prior to the post-conviction proceedings that consecutive terms

were prohibited under that agreement.² Nor is there any support in the record for Johns's contention that he believed the discretion given the court under the 2008 agreement was restricted by the 2004 agreement. The record supports the trial court's determination that Johns's argument regarding the required concurrent sentences was an "afterthought" that was simply not part of the negotiations leading to the 2008 plea agreement.

¶9 Accordingly, we find the trial court did not abuse its discretion in denying Johns's petition for post-conviction relief, and although we grant his petition for review, we deny relief.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

J. WILLIAM BRAMMER, JR., Judge

²At the change-of-plea hearing, Johns's counsel told the trial court that he was "not waiving any legal argument we might have that [CR 2004-041 and CR 2003-012] have to be treated as a single offense." But, he acknowledged, "we may not have that legal argument," and he did not object to or contradict the explanation given at the change-of-plea hearing of the court's sentencing discretion, including its authority to impose consecutive sentences for the relevant offenses. Furthermore, the "single offense" argument counsel made below is different from the argument made here.